No. 480

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

LOUIS McNEESE, JR., a minor, by Mabel McNeese, his mother and next friend, et al.,

Petitioners,

vs.

BOARD OF EDUCATION FOR COMMUNITY UNIT SCHOOL DISTRICT 187, Cahokia, Illinois, et al.,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE.

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Respondents.

MOTION OF ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION, FOR LEAVE TO FILE ATTACHED BRIEF AS AMICUS CURIAE.

The Illinois Division of the American Civil Liberties Union, a New York corporation, respectfully moves for leave to file the attached brief as *amicus curiae*, in support of petitioners in this cause, pursuant to Rule 42(3) of the rules of this Court. Petitioners have consented to the filing of this brief in a letter on file with the Clerk of this Court. Counsel for respondents replied to the request of amicus for consent by saying that no decision could be made until after the Board of Education meeting scheduled for February 11, 1963. All correspondence is on file with the clerk of this Court.

In support of this motion, amicus states:

1. For more than forty years, the American Civil Liberties Union has dedicated itself to the preservation and advancement of those liberties considered basic to a free society. The ACLU believes that it is of the utmost importance to ensure prompt access to a federal forum for litigants who claim that federal constitutional rights have been denied by state officials.

2. The central question presented by this case is whether or not a plaintiff challenging racial segregation in a school district can be denied access to a federal district court under 28 U.S.C. 1343 until he has exhausted whatever remedy is provided by state administrative procedures. A similar question has arisen in a pending case in which movant is participating, *Owens* v. *Board of Education*, No. 1886D (D.C. E.D. Ill.), and disposition of this issue in the instant litigation will directly affect movant's position in that case.

3. The ACLU filed a brief as amicus in support of the appellants in *Brown* v. *Board of Education*, 347 U.S. at 485. We believe that the reversal of the decision below in this cause is necessary in order to implement the principles set forth by this Court in the *Brown* case.

4. Petitioners' brief deals with the nature and adequacy of the specific administrative remedies provided by Illinois for the existence of segregation in state public schools. The amicus brief submitted herein seeks to treat the larger question of the extent of the jurisdiction of federal district courts under 28 U.S.C. 1343 and the federal Civil Rights Act, and discusses the historical background and policies behind those acts. The presentation in movant's brief does not repeat material contained in petitioners' brief.

Respectfully submitted,
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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

INTEREST OF AMICUS

The American Civil Liberties Union is dedicated to the preservation and promotion of the basic civil liberties of a free society. Amicus believes that administrative procedures provided by a state in the area of school desegregation cannot control construction and application of the Federal Civil Rights Act which provides protection in the federal courts for federally secured rights.

ARGUMENT.

I. A REQUIREMENT OF EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES NULLIFIES THE CONSTITUTIONAL RIGHT TO AN EDUCATION ON A NON-DISCRIMINATORY BASIS.

Regard for state sovereignty within the federal system cannot continue to control the functioning of the federal judiciary as the states devise rules and regulations and establish a hierarchy of administrative bodies to protract the procedure by which those, such as petitioners, can enjoin segregation in the public schools.[1] An analysis of the litigation and of statistics in the area of school segregation should help the Court to see what is already known by many. A court, as Chief Justice Taft stated, would be blind not to see what "all others can see and understand." *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 37 (1922). "There is no reason why (Courts) should pretend to be more ignorant or unobserving than the rest of mankind." *Affiliated Enterprises* v. *Waller*, 1 Terry 28, 1 Del. 28, 5 A.2d 257, 261.

In problems of racial discrimination in schools, the statistics are revealing and significant, and the courts may

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[1] See, for example, Ala. Acts 1955, Vol. 1, No. 201, p. 492; Ark. Acts 1959, Vol. 2, No. 461, p. 1827; Fla. Laws 2d Ex. Sess. 1956, ch. 31380, p. 30; Ga. Laws 1961, H. Res. No. 225; La. Acts 1958, Act No. 259, p. 856; Miss. Acts 1960, S. Bill Nos. 2010, 1900; N.C. Laws Ex. Sess. 1956, ch. 7, p. 14; S.C. Acts 1955, No. 55, p. 83; Tenn. Acts 1957, ch. 13, p. 40; Tex. Acts 1957, ch. 287, p. 683; Va. Acts Ex. Sess. 1956, ch. 70, p. 74, as amended by Va. Acts 1958, ch. 500, p. 638, as amended by Va. Acts Ex. Sess. 1959, ch. 71, p. 165.

have reason to find that disparities of such magnitude almost preclude any explanation except a policy and pattern of racial discrimination by state officials.[2]

What is perhaps most disturbing is that to require an exhaustion of state administrative remedies by those seeking admission to non-segregated schools is to forget that the denial of this right by state agencies, by state officials, and by state procedure led to the *Brown* v. *Board of Education* decision 347 U.S. 483 (1954), and to subsequent litigation. As was stated in a significant case, in which complainants charged discrimination in the administration of voter registration and in other aspects of voter qualification:

> "The problem has its genesis in racial discrimination. . . . The Federal Court may—and perhaps must—take action on a showing of discrimination even though to do so effectually bypasses or dispenses with review by a State administrative or judicial tribunal. The occasional necessity of some such interruption of normal, ordinary processes was therefore, contemplated and authorized by Congress." *State of Alabama* v. *United States*, 304 F. 2d 583, 585, 590 (5th Cir., 1962).

The federal judiciary must not allow the detrimental effects of segregated education to continue by its failure to provide an effective means of combating those defensive and offensive efforts by the states to increase and

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[2] Appendix A contains statistics on school segregation-desegregation. Courts have studied and used similar statistical summaries to find patterns of racial discrimination in other areas. See, for example, the statistics on the registration of voters in **State of Alabama v. United States**, 304 F.2d 583, 586 (5th Cir. 1962); the statistics on the composition of Petit and Grand Juries, **United States v. Harpole**, 263 F.2d 71 (5th Cir. 1959) and other cases collected in footnote 13 at page 77.

prolong those deleterious effects.[3] In the *State of Alabama* case the Court of Appeals for the Fifth Circuit found "full and elastic resources" for the shaping of a remedy to vindicate the fundamental constitutional rights of those Negro voters who had been discriminatorily denied registration because of their race and color. As the court said:

> "Here the matter at stake is the fulfillment of a policy wrought out after extensive consideration of what Congress thought to be contemporary evils by States and agencies of States in the spurious, sometimes sophisticated, sometimes crude, practices by which Negroes were effectively denied the right to vote because of color and race alone. It was this evil which brought about the statute. It is inconceivable that in its enactment Congress meant by this broad language to grant less than effective judicial tools to combat it." 304 F. 2d at p. 591.

It is equally inconceivable that this Court intends to condone either "spurious," "sophisticated," or "crude" efforts to dilute the impact of *Brown* v. *Board of Education*. Certain states have in the past devised a number of schemes intended to circumvent other constitutional guarantees. However, even when state laws, rather than state administrative procedures, have been used to resist or nullify decisions of this Court regarding constitutional rights, this Court has found no reason to withhold access to the

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[3] See "Education: Survey of Developments 1957-61," Race Relations Law Reporter, vol. 6, no. 3, which discusses state defensive methods (pupil placement, school closings, private school legislation and grants, and repeal of compulsory school attendance) and affirmative actions of resistance (state sovereignty commissions and various registration and filing requirements applied to the N.A.A.C.P.). See also Maslow and Cohen, School Segregation, Northern Style, Public Affairs Pamphlet, #316 (1961).

federal courts because of any vague fear of imbalancing the federal system. For example, two attempts by Oklahoma to disregard the prohibitions of the Fifteenth Amendment were struck down. *Guinn* v. *United States*, 238 U.S. 347 (1915) and *Lane* v. *Wilson*, 307 U.S. 268 (1939). In the *Lane* case, the Court invalidated the state statute, saying that the Fifteenth Amendment barred "sophisticated as well as simple-minded" "contrivances by a state to thwart equality in the enjoyment of the right to vote." (307 U.S. at p. 275). This Court also affirmed the judgment of the three-judge court that the Boswell Amendment to the Alabama Constitution, which required prospective voters to explain a section of the Alabama Constitution to a registrar, was another device in complete disregard of the Fifteenth Amendment. *Schnell* v. *Davis*, 336 U.S. 933, affirming 81 F. Supp. 872 (1949). Similarly, the "White Primary" cases originated in federal courts and involved state laws which nullified decisions of this Court; these cases like the voting cases were decided in the federal courts without a requirement that the states must first construe their statutes aimed at invidious discrimination between white citizens and black (*Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953).

Neither a "scrupulous regard for the rightful independence of state governments . . ." *Matthews* v. *Rodgers*, 284 U.S. 521, 525 (1932), nor the "contribution . . . in furthering the harmonious relation between state and federal authority . . ." *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 501 (1941) requires deference to that local procedure which evades federal law by defiance and dilution of the principle that racial discrimination in public

education is unconstitutional and that "all provisions of Federal, State, or local law requiring or permitting such discrimination must yield to this principle." *Brown* v. *Board of Education*, 349 U.S. 294, 298 (1955).

The right to an education on a non-discriminatory basis is a precious and fundamental right of each individual child in this country. It is indeed cruel to say that a pattern of segregation in the schools can be proved only by the application to a board or to a hearing officer by first one child and then another child[4] or by one group of fifty children and their parents and then by another group of fifty children and their parents[5] and the denial of each such petition with the subsequent maze of rehearings, objections, and appeals.

When federal courts refuse to hear a case until each aggrieved child and his parents exhaust all administrative appeals, there is an invitation to continue the dual school system by the use of stringent and cumbersome procedural requirements.[6] The case of *Jeffers* v. *Whitley*, 197 F. Supp. 84 (M.D. N.C. 1961) demonstrates the ease with which the rule of exhaustion of administrative remedies can serve as a virtual judicial repeal of the law of desegregation. In the *Jeffers* case, plaintiffs brought a class action seeking an order requiring the school board

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[4] Carson v. Warlick, 238 F. 2d 724 (4th Cir., 1956); Covington v. Edwards, 264 F. 2d 780 (4th Cir., 1959); Holt v. Board of Education, 265 F. 2d 95 (4th Cir., 1959).

[5] Illinois Revised Statutes, 1961, Chapter 122, Section 22-19; McNeese v. Board of Education, 305 F. 2d 783 (7th Cir., 1962).

[6] For example, over fifty acts were passed during the 1960 extraordinary sessions of the Louisiana legislature, in an effort to continue the dual public school system in that state. See Race Relations Law Reporter, Vol. 5, No. 4 (Winter, 1960), for the complete texts of these resolutions and acts.

to prepare a desegregation plan for the schools. The court found that, of the eight minor plaintiffs who had requested transfers and who had attempted to exhaust their administrative remedies, three had failed to do so because they appeared at the school board hearing by their attorneys, rather than in person or by their parents, and that the other five, by failing to request transfers to *specific* schools, had not exhausted their remedies. Crudely, and yet effectively, did this administrative procedure emasculate the constitutional rights of these eight plaintiffs.

Similarly the more sophisticated, and perhaps better-intentioned, administrative remedy provided by the Illinois statute (Illinois Revised Statutes 1961, Chapter 122, Section 22-19) merely doubles the cost of litigation, requiring the federal court to sit idly by while records, books, and papers are produced; witnesses are called to testify; and arguments are made before the hearing officer appointed by the Superintendent of Public Instruction. The state administrative remedy is indeed deceptive in Illinois. After days or months of sessions, the superintendent may or may not take action. Is there any question that the required utilization of such state administrative machinery "dilutes the stature of the Federal District Courts, making them secondary tribunals in the administration of justice under the Federal Constitution"? *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, Douglas, *J.* dissenting at p. 180.

Those such as the petitioners in the instant case, who come before a federal court in a class action on behalf of themselves and all pupils in the school district similarly situated, allege an intransigent policy of segregation —either in the application of a pupil placement plan or in the rigid retention of a neighborhood school policy or in

the formation of gerrymandered attendance districts. They ask for desegregation of that school system. They do not ask merely for admission to a specified school. This distinction was understood and emphasized by the court in its decision in *Flax* v. *Potts*, 204 F. Supp. 458, 465 (N.D. Texas, 1962):

> "A judgment declaring unconstitutional a policy of racial segregation in a school system and providing for its termination with deliberate speed is the proper type of relief to be granted in these cases, if the pleadings are broad enough to justify it.'"

The rule of exhaustion of administrative remedies in school segregation cases forebodes an even more extensive use of evasive state legislation and of onerous, illusory administrative remedies, to frustrate the constitutional rights of plaintiffs in school segregation cases.[8] The pupil placement law[9] has been "the principal obstacle to

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[7] See also: **Carter v. School Board of Arlington County**, 182 F. 2d 531, 536 (4th Cir., 1950); **Gibson v. Board of Public Instruction of Dade County**, 246 F. 2d 913; (5 Cir., 1957); **School Board of City of Charlottesville v. Allen**, 240 F. 2d 59 (4 Cir., 1956); and **School Board of City of Newport News v. Atkins**, 246 F. 2d 325 (4 Cir., 1957); **Mannings v. Board of Education of Hillsborough County, Florida**, 277 F. 2d 370 (5th Cir., 1960).

[8] The history of state efforts to avoid integration in the schools does indeed show an evolution from direct opposition to the present more sophisticated forms of subversion of the constitutional principles set forth in **Brown v. Board of Education.** See "State Efforts to Circumvent Desegregation: Private Schools, Pupil Placement, and Geographic Segregation," 54 Nw. U. L. Rev. 354 (1959).

[9] With the exception of a very few cases, those petitions dismissed in the federal courts for plaintiffs' failure to exhaust state administrative remedies have all involved pupil placement laws.

desegregation in the South.'"[10] The success of these pupil placement laws as defiant assaults on the constitutional right of all pupils to be admitted to public schools, with all deliberate speed on a non-discriminatory basis, is phenomenal: The two circuits which have held that the pupil assignment laws are on their face a valid means of effecting desegregation and that this state administrative procedure must first be followed, include Virginia, South Carolina, Arkansas and North Carolina. Less than one-tenth of one per cent of the nearly one million Negro children in these states attended bi-racial schools in 1962.[11]

The judicial discontent with state administrative procedures as masks for a segregation policy has been unequivocally expressed by several of the lower courts:

> "This law, as shown on its face, is not a plan for desegregation nor is desegregation a part of its subject matter or purpose. As the court understands it, its real purpose is to codify the law as it already existed. . . . The pupil placement law at best provides a most cumbersome and time-consuming procedure to accomplish transfer of students. . . ." *Sloan* v. *Tenth District of Wilson County, Tennessee,* Civ. No. 3107 (M.D. Tenn., Nov. 22, 1961), 6 Race Rel. L. Rep. 999.
>
> "Under these circumstances it would be almost a cruel joke to say that administrative remedies must be exhausted when it is known that such exhaustion of remedies will not terminate the pattern of racial assignment but will lead to a remedy only in a few given

[10] Report of the United States Civil Rights Commission, Civil Rights U.S.A., Public Schools, Southern States 1962, p. 4. This indictment of the pupil assignment laws is echoed on page 6 of the same report.

[11] **Ibid.,** at p. 6.

cases based on geography—a consideration which has been disregarded in the assignment of white pupils." *Jackson* v. *School Board of City of Lynchburg, Va.*, 201 F. Supp. 620 (W.D. Va., 1962).

"This court . . . condemns the Pupil Placement Act when, with a fanfare of trumpets it is hailed as the instrument for carrying out a desegregation plan while all the time the entire public knows that in fact it is being used to maintain segregation by allowing a little token integration." *Bush* v. *Orleans Parish School Board*, Civ. No. 19270 (5th Cir., Aug. 6, 1962), 7 Race Rel. L. Rep. 693.[12]

Indeed, it seems unreasonable that each state might create its own labyrinth of hearings, appeals, statutes of limitation, and re-hearings so that the protection of this federally secured right by judicial scrutiny of school board actions and policies would depend on the vagaries of state administrative procedures. Giving deference to state administrative procedure in the school segregation cases is indeed unwarranted when the evidence shows that such remedies, designedly or unwittingly, entrench and prolong the pattern of segregation.

II. TO REQUIRE THE EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES NEGATES BOTH THE LANGUAGE AND THE POLICY OF THE CIVIL RIGHTS ACT.

The civil rights statutes were enacted by Congress to enforce the provisions of the Fourteenth and Fifteenth amendments:

"The purpose of this bill is, if possible and if necessary, to render the American citizen more safe in

[12] See also Green v. School Board of the City of Roanoke, 304 F. 2d 118, 123 (4th Cir., 1962) which found intolerable the discrimination "inherent in the initial assignment system" under the Virginia Pupil Placement Act.

> the enjoyment of . . . rights, privileges, and immunities. . . . I conclude, then, Mr. Speaker, by saying that in my opinion Congress has power to legislate for the protection of every American citizen in the full, free, and undisturbed enjoyment of every right, privilege, or immunity secured to him by the Constitution; and that this may be done—*First*. By giving him a civil remedy in the United States courts for any damage sustained in that regard." *Cong. Globe*, 42nd Cong. 1st Sess., pp. 475, 477 (April 5, 1871), remarks by Rep. Dawes.

Congress was aware of the possible futility of getting relief on the local or state level for the vindication of those rights denied by officials of the state."

This Court has examined the 1871 debates on the Civil Rights Act in their entirety and has concluded:

> "The third aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. The opposition to the measure complained that 'It overrides the reserved powers of the States,' just as they argued that the second section of the bill 'absorb (ed) the entire jurisdiction of the States over their local and domestic affairs'. . . .
>
> "The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe v. Pape*, 365 U.S. 167, 174, 180 (1961).

Thus, Congress vested original jurisdiction in the federal courts in order to enforce the substantive rights conferred

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[3] See Appendix B, "Memorandum on the Legislative History of § 1979."

by the Civil Rights Act.[14] To require petitioners in these school segregation cases to exhaust state administrative remedies is to ignore this mandate of the Civil Rights Act by determining that the agency or board *must initially* decide the issues. Thus, the original jurisdiction of the case is allocated to the state agency under the theory of "primary jurisdiction." Proponents of this theory would apply the concepts underlying the Administrative Procedure Act, 5 U.S.C.A. § 1001 *et seq.* (1946), and similar state administrative review acts, which are concerned with the judicial review of final agency action.[15] However, when petitioners seek access to the federal courts under the substantive provisions of 42 U.S.C.A. § 1983 and under the procedural provisions of 28 U.S.C.A. § 1343 (3), they cannot be barred by a doctrine of "priority of jurisdiction" in an agency. The federal judiciary, not a state superintendent of education and not a state sovereignty commission, is vested with original jurisdiction: "The district courts *shall* have *original* jurisdiction. . . . " 28 U.S.C.A. § 1343 (Emphasis added) That original jurisdiction cannot be usurped by giving "pre-original" jurisdiction to a state agency.

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[14] The Civil Rights Act of 1871 provided for exclusive federal jurisdiction. 17 Stat. 13. The codification of 1874 separated the substantive and jurisdictional parts of the Act, and the jurisdictional paragraphs were re-phrased. See R. S. §§ 563(12), 629(16). However, there is no evidence that Congress intended to change the meaning of the law by its 1874 revisions. The jurisdictional paragraph, 28 U.S.C. § 1343 now provides: "The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights . . . of all persons within the jurisdiction of the United States." See Brief for Petitioners, p. 14, **Monroe v. Pape**, 365 U.S. 167 (1961).

[15] 5 U.S.C.A. § 1009.

III. THE RULE OF EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES CANNOT BE USED TO NULLIFY THE GRANT OF ORIGINAL JURISDICTION IN THE FEDERAL COURTS FOR THOSE ALLEGING RACIAL SEGREGATION IN PUBLIC SCHOOLS.

Neither the federal courts nor the state courts follow an absolute rule that a party must always exhaust his administrative remedies before coming into court.[16] The doctrine of exhaustion of administrative remedies is unworkable and unwise when it is reduced to a neat word formula or an absolute requirement.[17] It is a doctrine based on judicial self-limitation, not a rule enervating jurisdiction. The law embodied in the holdings since *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), is clearly that sometimes exhaustion is required and sometimes not.[18]

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[16] Davis, "Exhaustion of Administrative Remedies," Administrative Law Treatise, vol. 3, §§ 20.01-20.10.

[17] See the frank statement by the Court of Claims. "There is no absolute requirement that a party exhaust his administrative remedies before coming into court. The court may entertain his suit before he has done so, if in its discretion it thinks the circumstances make it appropriate to do so." **Adler v. United States**, 146 F. Supp. 956, 957-958 (Ct. Cl., 1956). See also Davis, op. cit., § 20.03.

[18] Exhaustion of administrative remedies not required in **Allen v. Grand Central Aircraft Co.**, 347 U.S. 535 (1954); **Bethlehem Steel Co. v. New York State Labor Relations Board**, 330 U.S. 767 (1947); **Order of Railway Conductors of America v. Swan**, 329 U.S. 520 (1947); **Illinois Commerce Commission v. Thomson**, 318 U.S. 675 (1943).

Exhaustion of administrative remedies required in **Franklin v. Jonco Aircraft Corp.**, 346 U.S. 868 (1953); **Aircraft & Diesel Equipment Corp. v. Hirsch**, 331 U.S. 752 (1947); **Macauley v. Waterman S. S. Corp.**, 327 U.S. 540 (1946).

See also Davis, "Administrative Remedies Often Need Not Be Exhausted," 19 F.R.D. 437 (Adv. No. 9, Jan. 1957).

The policy considerations which support the wisdom of the exhaustion doctrine are clearly not applicable in this type of case in which plaintiffs allege a pattern of school segregation.

Considerations of comity are often advanced as one of the primary reasons for applying the exhaustion rule, particularly where action by a state is sought to be controlled through a federal court. For example in *Natural Gas Pipeline Co.* v. *Slattery*, 302 U.S. 300 (1937), this Court affirmed the denial by the district court of the injunction asked for, and stated:

> "The rule that a suitor must exhaust his administrative remedies before seeking the extraordinary relief of a court of equity . . . is of especial force when resort is had to the federal courts to restrain the action of state officers . . ." 302 U.S. at 310.

Another reason given is that in certain areas the administrative agency is better suited by its expertise to determine facts in certain areas. *Aircraft Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 768 (1947); *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540 (1946). A third reason was stated in the *Aircraft Equipment* case:

> "The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision, or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings." (331 U.S. at page 767).

Not one of these various reasons so often given for the required exhaustion of administrative remedies can be sustained when petitioners' fundamental right to an edu-

cation in a non-segregated school is jeopardized because time, finances and complicated state administrative procedures impose grave limitations on any attempt to enforce that right. The doctrine of comity cannot be used to insulate the states so as to allow them to use their power in order to nullify a federally secured right. As this Court said when it enjoined city and county officials of Tuskegee and of Macon County, Alabama, from enforcing a statute which removed from the city all except a few Negro voters and no white voter:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition.'" *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347, 348 (1960).

No expertness or special background is required to determine the facts when the charge is one of a policy and pattern of segregation in the public schools. As the court said in *Romero* v. *Weakley*, 226 F. 2d 399, 402 (9th Cir. 1955): "No expert knowledge and experience is required to determine whether the segregation of school children exists."

The third factor often used to justify the rule of exhaustion of state administrative remedies, namely that the agency might sustain the claim of the petitioner, is equally inappropriate in the school segregation cases. One court has accurately observed that when the relief sought is a judgment declaring unconstitutional a policy

of racial segregation, then school boards and appointees of school boards are impotent to give relief:

> "It is manifest that neither the board of county school trustees, nor the state superintendent, nor the state board of education, is vested with any jurisdiction to determine . . . the question whether or not any action by any board of . . . trustees is violative of constitutional rights. Authority to determine such questions is exclusively the function of the judiciary . . ." *Bruce* v. *Stilwell*, 206 F. 2d 554, 556 (5th Cir. 1953)

Denial of these individual rights cannot be avoided by characterizing the rule of exhaustion of state administrative remedies as merely a postponement of federal jurisdiction. A right denied today may never be vindicated if the plaintiffs, who are in each case school children, must go from hearing to hearing or from agency to agency. Such a procedural requirement merely enlarges the hiatus between the wrong and the relief.

CONCLUSION

A study of the two-volume report of the 1962 United States Commission on Civil Rights, which covered public schools in the southern, northern, and western states, indicates how various administrative procedures are used to impede the attempts of students to gain admission to non-segregated schools. The effect and purpose of the pupil placement laws are unequivocally established by the statistics and the litigation.[19] Even an open-transfer system such as that provided in Philadelphia, Pennsylvania, or a special transfer system such as that utilized

[19] See Appendix A of this brief.

in St. Louis, Missouri, can be used to re-segregate after de-segregating.[20]

If the federal judiciary requires exhaustion of state administrative remedies in school segregation cases, whether that remedy be a sophisticated blind alley or a simple-minded road block, then the federal judiciary is not performing its duty as expressed in the Civil Rights Act. The urgency of this duty is underscored by the history of non-compliance with or token implementation of the principles announced by this Court in *Brown* v. *Board of Education* almost nine years ago.

Respectfully submitted,

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[20] Civil Rights U.S.A., Public Schools North and West, 1962, Philadelphia, Pennsylvania, pp. 105-173; St. Louis, Missouri, pp. 249-298; pp. 296-297, 191-194. See also Maslow, "De Facto Public School Segregation," 6 Vill. L. Rev. 353-376 (1961).

APPENDIX A.

The following statistical summary of segregation-desegregation activity in Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia, is taken from summaries compiled by the 18 state correspondents of SOUTHERN SCHOOL NEWS and published in November, 1962.

SOUTHERN SCHOOL NEWS is published by the Southern Education Reporting Service, an impartial, fact-finding agency directed by a board of Southern newspaper editors and educators under a grant from the Ford Foundation. Statistics were supplied by agencies of the respective states and are for the 1962-1963 school year, except where indicated.

Definition of Terms

Desegregated—Changed from segregated to biracial or multiracial status, either in practice or principle.

Integration—Absence of all racial distinctions.

Biracial Schools—Ones attended by more than one race.

Districts With Negroes and Whites—A district having both Negro and white students, whether the district is segregated or desegregated.

Negroes w/Whites—Used in tables for number of Negroes attending schools with whites.

Region—Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia.

Status of Segregation-Desegregation

Public Schools

The region has 6,229 school districts, with 3,058 of them having both Negroes and whites. Of these districts having both races, 878 have Negroes attending school with whites and another 94 districts have desegregation policies but no biracial schools. About 85 per cent of the districts desegregated voluntarily, without a court order. The table on page 3a shows that 32.6 per cent of the Negroes are in desegregated districts but of these 1,068,678 Negro students, only 23.9 per cent of them actually attend desegregated schools. The South has 255,367 Negroes in biracial schools, representing 7.8 per cent of the region's 3,279,431 Negroes. The border area, including Delaware, District of Columbia, Kentucky, Maryland, Missouri, Oklahoma and West Virginia, has 475,549 Negro students, or 14.5 per cent of the region's total Negro enrollment, and has 243,150 Negroes in desegregated schools, representing 95.2 per cent of the region's Negroes in desegregated schools. The desegregated Southern states of Arkansas, Florida, Georgia, Louisiana, North Carolina, Tennessee, Texas and Virginia have 1,985,523 Negro students, or 60.5 per cent of the region's total Negro enrollment, and 12,217 are in desegregated schools, representing 4.8 per cent of the region's Negroes in desegregated schools. The three segregated states, Alabama, Mississippi and South Carolina, have 818,359 Negro students, or 25 per cent of the region's total Negro enrollment.

State	School Districts With Negroes			Enrollment		In Desegregated Districts		Negroes In Schools With Whites	
	Total	& Whites	Deseg.	White	Negro	White	Negro	No.	% ‡‡
• Alabama	114	114	0	527,075**	280,212**	0	0	0	—
• Arkansas	417	228	12	320,204***	108,841***	58,993	13,801	250	.230
Delaware	87	87	87	74,417	17,073	61,045	11,684	9,460	55.4
Dist. of Columbia	1	1	1	22,141	110,759	22,141	110,759	87,749	79.2
• Florida	67	67	10	917,557	219,380	531,946*	99,292*	1,168	.532
• Georgia	198	182	1	668,548	327,656	58,629*	51,991*	44	.013
Kentucky	206	167	150	610,000*	43,000*	460,000*	34,000*	22,765**	52.9
• Louisiana	67	67	1	451,778*	297,427*	39,352	59,428	107	.036
Maryland	24	23	23	515,093*	152,667*	510,219	152,667	62,121	40.7
• Mississippi	150	150	0	297,419**	288,089*	0	0	0	—
Missouri	1,633	214*	203*	766,800*	85,200*	NA	75,000*	35,000*	41.1
• North Carolina	173	173	16	802,188	339,841	165,621	78,305	901	.265
Oklahoma	1,180	240	195	513,064*	41,600*	301,430*	34,493*	10,555**	25.4
• South Carolina	108	108	0	361,162	250,058	0	0	0	—
• Tennessee	154	143	25	671,348*	161,000*	289,096*	96,095*	1,817	1.13
• Texas	1,461	919	174	1,951,613*	310,341*	1,100,000*	125,000*	6,700*	2.16
• Virginia	134	132	31	679,230**	221,037**	355,229	100,913	1,230	.556
West Virginia	55	43	43	412,878*	25,250*	412,878	25,250	15,500*	61.4
TOTALS	6,229	3,058	972	10,562,515	3,279,431	4,366,579†	1,068,678	255,367	7.8

• States with pupil placement plans.

‡‡ Proportion of Negroes in schools with whites to total Negro enrollment.

* Estimated ** 1961-62 *** 1960-61 † Missouri not included.

Teachers

Public school teachers remain segregated in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia, including six states that have desegregated schools. The eight other states and the District of Columbia reported some degree of teacher desegregation, although in four states—Missouri, Oklahoma, Texas and West Virginia—a sizeable number of Negro teachers lost their jobs in the change to biracial schools.

Litigation

More than 293 court cases have been filed in state and federal courts on school segregation, desegregation and related issues. Every state in the region has had litigation on the school issue.

Legislation

Legislatures of 16 states have adopted 379 new laws and resolutions to prevent, restrict or control school desegregation. Most of the legislation has been added to the statute books since 1954, although a few laws were enacted in anticipation of the U. S. Supreme Court's 1954 decision. Oklahoma has passed legislation to encourage desegregation. The Missouri and West Virginia legislatures removed racial designations from their school laws, recognizing desegregation as an accomplished fact. In 1959, Maryland ratified the 14th Amendment to the U. S. Constitution, giving approval to the amendment on which the desegregation decisions were based. Alabama, Arkansas, Georgia, Louisiana, North Carolina and Virginia have adopted tuition grant laws. Legislatures in Alabama, Arkansas, Florida, Louisiana, Mississippi, North Carolina,

South Carolina, Tennessee, Texas and Virginia set up pupil placement plans. Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina and Virginia legislators have approved interposition resolutions. Local-option provisions for closing schools are on the law books in Alabama, Florida, Georgia, Mississippi, North Carolina and Texas. Compulsory school attendance laws have been amended or repealed in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Virginia. Alabama, Florida, Louisiana and Virginia have laws to encourage or facilitate private schools. Legislation mentioned above has been adopted in other states, but has become invalid by court rulings, later legislation, or failure to receive approval in constitutional referendums.

APPENDIX B.

Memorandum on the Legislative History of § 1979.

We suggest that the legislative history of R. S. § 1979 contains much evidence that the reasons which prompted Congress to confer exclusive federal jurisdiction for actions under R. S. § 1979 are relevant today. The Congress that enacted R. S. § 1979 thought that "prejudices and passions, which make men forget their duties are more likely to be local than national." We suggest that in our own day, the federal judiciary is "more likely to be impartial" in this area of protecting the individual's federally secured right to a non-segregated education.

During the course of the legislative debates on R. S. § 1979, the following statements were made or read into the record:

> "Local prejudices may become so strong and violent that they may overturn that sense of justice which we fondly hope, however, may ever dominate in the bosoms of all our rulers. We well understand the influence of popular sentiment, under elective governments, upon those who depend upon popular will for place and power. Governors, judges, and juries give way to mania which sometimes seizes hold of the popular mind. Prejudices and passions, which make men forget their duties are more likely to be local than national. It is better, therefore, to have a Government less local and more general, and which is responsible to a whole nation and not alone to a small portion. Such a Government is more likely to be impartial, and to remain uninfluenced by prejudice and passions."
>
> Cong. 42nd Cong. 1st Sess., p. 368 (March 31, 1871), remarks by Sheldon of Louisiana.

"The question is sometimes asked, Why do not the courts of law afford redress? Why the necessity of appealing to Congress? We answer that the courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?"

Cong. Globe, 42nd Cong. 1st Sess., p. 394 (April 1, 1871) remarks by Rainey of South Carolina.

"Some have here contended that our protection must come from the State in which we chance to reside. The old hateful doctrine of State rights is here urged, and we are told that the Federal Government has nothing to do in behalf of the citizen unless, indeed, the State authorities call for aid. These narrow views are repugnant to me. Our national life is involved in crises such as this. Shall not a power co-extensive with this life be invoked? Do we not instinctively turn to the Government for protection?"

Cong. Globe, 42nd Cong., 1st Sess., App. p. 262 (April 4, 1871), remarks by Dunnell of Minnesota.

"To say in our Constitution . . . that State laws shall not be made or enforced to abridge these rights . . . nor the States deny protection of these rights . . . and then to say that Congress can do no such thing as . . . open the United States courts to enforce any such laws, but must leave all the protection and law-making to the very States which are denying the protection is plainly and grossly absurd."

Cong. Globe, 42nd Cong., 1st Sess., App. p. 68, (March 28, 1871), remarks by Shellabarger of Ohio.

"If the State Legislature pass a law discriminating against any portion of its citizens, or if it fails to enact provisions equally applicable to every class for

the protection of their person and property, it will be admitted that the State does not afford the equal protection. But if the statutes show no discrimination, yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another, or if secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws."

Cong. Globe, 42nd Cong., 1st Sess., App. p. 315 (April 6, 1871), remarks by Burchard of Illinois.